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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re T. S., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. T. S., Defendant and Appellant.	D054510 (Super. Ct. No. J216634)

APPEAL from a judgment of the Superior Court of San Diego County, Browder A. Willis, III, Judge. Affirmed in part and reversed in part with directions.

T. S. (the minor) appeals from an adjudication by the juvenile court that she committed robbery (Pen. Code, § 211; count 1) and theft from the person of another (Pen. Code, § 487, subd. (c); count 2). The minor contends, and the Attorney General concedes, the true finding for theft must be reversed as it is a lesser included offense of robbery. She also contends the juvenile court prejudicially erred by admitting opinion

testimony on grounds it went to the ultimate issue in the case and was outside the scope of re-cross examination. We agree that the true finding for grand theft under Penal Code section 487, subdivision (c) must be reversed. However, we reject minor's evidentiary challenge. Accordingly, though we reverse the count 2 finding, we affirm the remainder of the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

The minor worked at Petco Park as a vendor commissary worker. She worked within a room, VC 131, in which cash was handled during the course of the day during baseball games. The door to the room was unmarked and left unlocked. Though she was aware of the money, the minor did not have the authority to handle it. In May 2007, the minor was suspended from work after other workers reported to management that she was responsible for alcohol found in the back of one of the vending commissaries. Her uniform and badge were confiscated and she was admonished not to return to the stadium.

On June 24, 2007, Mary Anne Doyle, a human resources director at the park, was taking a break when she saw the minor get out of a car wearing a heavy parka with a hood. Doyle thought it was strange because it was a warm day and the minor was not supposed to be around the building. Doyle saw the minor put up her hood as she walked past a retail store on the site. Surveillance video cameras recorded the minor while she talked to some vendors, walked up to an employee entrance, and then headed to another gate.

Evan Bonahoom was a vending commissary cashier in June 2007. He considered the minor to be a friend because whenever he saw her they talked. On June 24, Bonahoom was working in room VC 131. He typically worked with a manager but that day, at some point around 12:30 p.m., he was seated by himself when the minor entered the room alone, gave him a hug and then stepped out of the way. The minor had never given Bonahoom any sort of hug before; they had never displayed any sort of affection to each other and they had never had any physical or intimate relationship. She was wearing a hooded coat with some fur, and jeans. They talked for a split second, and two African-American men entered the room behind her. The men walked up to Bonahoom and one of them punched him under his left eye and grabbed a bag of about $40,000 in cash that was kept under the table. Bonahoom did not recognize the men as Petco workers, and an outsider would not normally know that cash was kept underneath the table. The minor never yelled out or expressed surprise during the incident, including after the man punched Bonahoom. Nothing was said between the minor and the two male individuals.

The minor and the two men ran from the room with Bonahoom in chase. He struggled for the bag with the man who had punched him, and a few stacks of money fell out. Bonahoom noticed that one man ran away in one direction, and the minor and the other man ran away the other way.

A San Diego Police Department detective testified that robbery offenders commonly employ distraction techniques on the victim and also deny involvement or affiliation with other persons at the crime scene.

The minor testified in her defense. She admitted being at Petco Park on the day of the robbery because she had a ticket to the game, but she denied being anywhere near the employee park entrance. She wore a hooded jacket because she had not done her hair and she liked the jacket's style. The minor testified that she saw and tried to talk to the two male assailants before entering the vending commissary, but she did not know who they were. According to the minor, she was startled and scared by the incident, and ran out of the room with one of the assailants behind her. A counselor and teacher at the minor's high school testified to the minor's honesty and truthfulness.

DISCUSSION

I. *True Finding on Grand Theft*

Minor argues, and the Attorney General concedes, the true finding on the count 2 grand theft must be reversed because it is a lesser included offense of the count 1 robbery. Theft — whether divided by degree into grand theft or petty theft — is indeed a lesser included offense of robbery; robbery includes the added element of force or fear. (*People v. DePriest* (2007) 42 Cal.4th 1, 50.) We agree the minor cannot be convicted of both charges based on the same conduct, and thus the true finding on the grand theft should be reversed. (See *People v. Ortega* (1998) 19 Cal.4th 686, 699, disapproved on other grounds in *People v. Reed* (2006) 38 Cal.4th 1224, 1228.) Hence we reverse the true finding on count 2, and direct the juvenile court to strike that finding from the judgment.

II. *Admission of Witness Bonahoom's Testimony*

A. *Background*

Shortly after Bonahoom had been excused as a witness, defense counsel recalled him to ask him the following additional cross-examination questions:

"[Defense counsel]: At the time of the robbery, were you very startled because of the robbery I — I think you answered that. I'm sorry.

"[Bonahoom:] Yes.

"[Defense counsel:] You were startled?

"[Bonahoom:] Yes.

"[Defense counsel:] So you did not observe everything going on around you? You just wanted to get the money back?

"[Bonahoom:] Well, I noticed a couple things.

"[Defense counsel:] Which one?

"[Bonahoom:] How they looked — I guess that's it. How they looked, and the money."

The prosecutor then asked the following redirect examination question:

"[Prosecutor:] So based on your observation, Evan, you are looking at the timing of everything. Their dress. Their demeanor. The timing of your punch, of the taking of the money. Did you have any doubt whether they were working together, the three of them?

"[Bonahoom:] No."

Defense counsel objected: "Objection, you Honor, as to the scope of the one or two. I don't think he was the observer." The prosecutor explained: "[Bonahoom] is the only one who can observe and form a common sense opinion about what was going on on the day of this robbery inside the vending commissary and immediately outside of it. It is a matter of common sense. So to say as to what was happening and [defense counsel] sort of opened the door in terms of, well, whether you observed everything going on or you couldn't have observed everything going on." When the juvenile court ruled it would allow the question, defense counsel continued his objection: "I was getting at his ability to describe what happened. That was all I was getting into. I didn't go into who if they were together [*sic*]. So I stand by my objection that the court overruled." The prosecutor repeated his question:

"[Prosecutor:] Based on the details you saw that day, do you have any doubt whatsoever as to whether [the minor] and the other two males were together?

"[Defense counsel:] Objection.

"[Bonahoom:] No."

B. *Contentions*

Minor contends the juvenile court abused its discretion by overruling her objection to Bonahoom's testimony because it was inadmissible lay opinion testimony on an ultimate issue, namely, her state of mind, and it was not necessary or helpful to the trier of fact. She also contends the testimony elicited from Bonahoom on re-direct examination lacked foundation and was beyond the scope of cross-examination in three respects: the prosecutor's question (1) misstated the witness's prior testimony; (2)

encompassed the witness's *opinion* on what he observed, not simply *what* he observed; and (3) focused on the timing of events rather than the appearance of the assailants, i.e., how they looked.

The People respond that the minor forfeited her claims by failing to raise them below; that counsel's objection was only that the testimony was beyond the scope of re-cross-examination. Setting the forfeiture aside, the People further argue that Bonahoom's testimony about his belief as to whether the minor and other assailants were working together is admissible lay opinion in that it was rationally based on the witness's perception and helpful to a clear understanding of his testimony. Finally, they argue that even assuming admission of the testimony was error, it was harmless given the totality of the evidence.

C. *Analysis*

We review the trial court's rulings concerning the admissibility of the evidence for abuse of discretion. (*People v. Riggs* (2008) 44 Cal.4th 248, 290; *People v. Thornton* (2007) 41 Cal.4th 391, 444-445.) This standard applies to a trial court's decision to admit lay opinion testimony. (See *People v. Farnam* (2002) 28 Cal.4th 107, 153; *People v. Medina* (1990) 51 Cal.3d 870, 887.) Error in the admission of evidence is reversible only if there was a timely and specific objection to the evidence, the objection should have been sustained and the evidence excluded, and the error resulted in a miscarriage of justice. (Evid. Code, § 353.)

As a threshold matter, we agree with the People that the minor forfeited any objection to Bonahoom's testimony on grounds it was improper opinion on an ultimate

issue in the case or lacked foundation. Counsel's objection, as we have recounted above, vaguely challenged the "scope" of the question; that the question on redirect elicited testimony that was beyond the scope of his re-cross examination. Such an objection does not preserve the other evidentiary challenges advanced by the minor on appeal. Having failed to assert a specific or timely objection to the prosecutor's question to Bonahoom on grounds it sought an improper opinion or lacked foundation, appellate review of any such evidentiary contention is barred. (*People v. Farnam, supra,* 28 Cal.4th at p. 153.)

Even if such a claim were preserved, however, we would conclude the trial court did not abuse its discretion in allowing the testimony. As the minor concedes, "[a] lay witness may testify to an opinion if it is rationally based on the witness's perception and if it is helpful to a clear understanding of his testimony." (*People v. Farnam, supra,* 28 Cal.4th at p. 153, citing Evid. Code, § 800.) Lay opinion testimony is helpful to a clear understanding " 'where the concrete observations on which the opinion is based cannot otherwise be conveyed.' " (*People v. Hinton* (2006) 37 Cal.4th 839, 889.) In *Hinton*, the California Supreme Court found no error in the trial court's admission of a lay witness's opinion that the defendant " 'was the person who was directing [another person]' " in a drug deal. The court reasoned: "It is certainly possible that [the witness's] impression rested on subtle or complex interactions between Barnes and defendant that were difficult to put into words, which would render [the witness's] opinion proper." (*Hinton,* at p. 889.) The court went on to hold there would be no prejudice from the testimony even if it were admitted in error. (*Ibid.*)

Here, Bonahoom's opinion was based on his personal observations of the minor's actions (and inaction) and those of the two men who entered the vending commissary shortly after her, including their conduct after his assailant grabbed the money and attempted to flee with it in hand. As in *Hinton*, the trial court could reasonably conclude that Bonahoom's opinion about the minor's association with the other men rested on subtle interactions that could not be easily described, and thus was helpful to a clear understanding of his testimony. Accordingly, on this record, we cannot say Bonahoom's testimony lacked a rational basis or failed to clarify his other testimony. Moreover, perceptions such as those formed by Bonahoom are sufficiently within common experience. Applying the highly deferential abuse of discretion standard, we cannot simply second-guess the trial court's ruling. (*People v. Thornton*, *supra*, 41 Cal.4th 391, 429.) The court's ruling was not "outside the bounds of reason" (*ibid*) and thus we conclude it acted well within its discretion in permitting Bonahoom's lay opinion on that issue. There was no reversible evidentiary error.

Finally, even assuming some evidentiary error occurred, the minor could not have been prejudiced since there was testimony from Bonahoom and others concerning the minor's unusual behavior on the day in question, including her wearing a heavy hooded coat on a warm summer day, which the trier of fact could reasonably conclude was intended to hide her identity from surveillance cameras and other security. Apart from his opinion, Bonahoom specifically recounted facts suggesting cooperation between the three assailants, including that the minor hugged him seconds before the other men entered the room and expressed no surprise at the ensuing events. A detective testified

that such conduct was a typical distraction technique in cases of robbery. The totality of the evidence permitted the jury to conclude that the minor worked with the two males in committing the robbery. Accordingly, we hold there is no reasonable probability of a different result even if Bonahoom's opinion had been omitted. (*People v. Hinton, supra*, 37 Cal.4th at p. 889.)

DISPOSITION

The true finding for the count 2 offense of grand theft (Pen. Code, § 487, subd. (c)) is reversed and the matter remanded to the juvenile court with directions to strike that finding. In all other respects the judgment is affirmed.

O'ROURKE, J.

WE CONCUR:

HALLER, Acting P. J.

McINTYRE, J.